

9 Official Opinions of the Compliance Board 132 (2014)

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 - ◆ PREFERABLY IN PLAIN LANGUAGE

*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

July 30, 2014

Re: Maryland Health Benefit Exchange
Craig O'Donnell, Complainant

This opinion addresses the second and third complaints of four complaints by Craig O'Donnell ("Complainant") that the Maryland Health

Benefit Exchange Board (“MHBE Board”) has violated the Open Meetings Act in numerous ways since its inception in 2011. The Compliance Board addressed the first complaint last May in 9 *OMCB Opinions* 110 (2014). In the interest of providing MHBE with a prompt advisory opinion on its closed-meeting practices, the Compliance Board also addressed the disclosure practices complained of in the later complaints.

Here, we will address the remaining allegations in the second complaint, which are that the MHBE Board discussed in four closed meetings matters that the Act required it to discuss in open session. As will become evident, our resolution of this complaint is hampered by the shortcomings in disclosures, as found in our prior opinion.¹ We will work with what we have and state our conclusions as we go along.

We will also address the allegation in Complainant’s third complaint that the MHBE Board’s response to the first complaint did not disclose all of the matters that the MHBE Board discussed in its December 6, 2013 closed session.

I. The Second Complaint

A. Applicable principles

The same broad principle applies to each meeting: “Except as otherwise expressly provided in [the Act], a public body shall meet in open session.” State Government Article § 10-505. The Act expressly provides that some functions are excluded from the Act. For example, as explained in 9 *OMCB Opinions* 110, a meeting held solely to perform an “administrative” function is excluded from most provisions of the Act. The Act also expressly provides that a public body may meet in a closed session to discuss topics that fall within one or more of the fourteen subjects that the General Assembly has deemed appropriate for closed-door discussion. *See* § 10-508(a), (d). However, before a public body may meet behind closed doors to discuss one of those fourteen subjects, or “exceptions,” the public body must vote publicly on a motion to exclude the public from the discussion, and its presiding officer must “make a written statement of the reason for closing the meeting.” § 10-508(d). In that statement, the presiding officer must also disclose the “topics to be discussed” and the statutory exception relied upon as authority for closing the meeting. The written “closing statement” then effectively serves as a set agenda for the closed session: the members of the public body may not discuss topics that they did not disclose before the closed session, and their discussion of those topics may not exceed the scope of the exception they claimed. *See* § 10-508 (a), (d). The exceptions are to be “strictly construed in favor of open meetings of public bodies.” After the meeting, the public body must disclose, in the minutes of the next open session, information that discloses

¹ The MHBE’s disclosure violations pertained to the disclosures it was required to make about its closed meetings. The minutes of many of its open sessions in 2013 are unusually detailed.

what was actually discussed, who attended the closed meeting, and what actions the public body took. *See* § 10-509(c)(2).

Here, we address whether the MHBE Board's closed-door discussions exceeded the scope of the exceptions and topics that its presiding officer listed on the closing statement that its members adopted for each of the four meetings. To address that question, we rely on the minutes that the MHBE Board adopted for each closed session. By statute, these minutes are "sealed" to the public but available to us for the purposes of addressing complaints. We are to "maintain the confidentiality" of these minutes, § 10-502.6(c) (iii), and we therefore refer to them only in general terms. Ordinarily, we would rely also on the disclosures made in the closing statements and subsequent open-meeting minutes. However, as found in 9 *OMCB Opinions* 110 (2014), the MHBE Board routinely failed to make these disclosures, and it did not make them for these meetings. We therefore lack a contemporaneous statement of the topics that the members expected to discuss and the members' reasons for excluding the public from each discussion. We will rely instead on the partial disclosures that the MHBE Board made in a later summary of the events of its closed meetings and the additional information contained in the MHBE Board's response to the complaint.

B. The March 12, 2013 meeting

The minutes of the open session that immediately preceded the March 12 closed session reflect the members' vote to close the meeting under two exceptions: §10-508(a)(1), the exception that permits a public body to discuss personnel actions regarding employees or officials under its jurisdiction, and §10-508(a)(14), the exception that provides that "a session may be closed before a contract is awarded or bids are opened, [to] discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." The MHBE Board's summary of this meeting discloses that "[t]he Board adjourned to closed session to discuss procurement related to business process consultant and certain licenses." The summary further reports that the MHBE Board "awarded a Noridian change order for I3 and Informatica license purchases and certain functionality related to the call center, and a Xerox change order," "awarded a contract for business process consulting services to Seamon Corporation," "considered changes to PMO resources," and "discussed PMO personnel decisions and performance of individuals in the PMO."

The MHBE Board's response elaborates on this information. It states that the Board "discussed the Program Management Office (PMO) contract and staffing needs of that contract" and "considered its PMO resource needs and the performance of resources, including the continuation or discontinuation of various contracts with PMO vendors, and what procurement decisions might result, including the potential for litigation." The response also states the MHBE Board's reasons for excluding the public. As to the personnel topics, the response states that "the discussion

pertained to assignment, removal, and performance evaluations of PMO resources over which the MHBE exercised control.” As to the contract matters, the response states, “the discussions were conducted in closed session to ensure that if the ultimate decisions were made to issue new RFPs or re-issue the existing RFPs, the procurement processes would not have been compromised by public discussions of evaluations of proposals or recommendations for awards.” Further, the response states, the MHBE Board “considered it necessary to preserve the ability to solicit proposals from other entities, for each of these procurements,” and “[c]onducting these discussions publicly might have revealed information that had the potential to adversely impact future procurements, if it proved necessary to pursue that option.”

The sealed minutes and the response report that a motion was made in open session to close the meeting under the § 10-508(a)(1) “personnel exception,” the § 10-508(a)(14) “procurement exception,” and two exceptions that, according to the minutes, had not been cited as a basis to close the meeting when the members voted to take that action. The two sets of minutes adopted by the MHBE Board thus convey different messages as to the statutory authority on which the members relied when they voted to close the meeting. One of the added exceptions, as set forth in § 10-508(a)(2), permits a closed session to “protect the privacy or reputation of individuals with respect to a matter that is not related to public business.” The other, set forth in § 10-508(a)(8), permits a closed session “to consult with staff, consultants, or other individuals about pending or potential litigation.” Because a public body may not invoke exceptions that it did not claim before the closed session, *see* § 10-508(d), we will only consider whether the personnel and procurement exceptions applied to the topics that the MHBE Board discussed.² We begin with the applicability of the personnel exception to the topics disclosed by the MHBE Board.

The personnel exception permits a public body to discuss (1) “the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom [the public body] has jurisdiction,” and (2) “any other personnel matter that affects 1 or more specific individuals.” We have no information on which individuals the MHBE was discussing, and it is unclear which staffing topics MHBE deemed to have fallen within this exception. We will explain why those facts matter, and which topics did *not* qualify as “personnel matters” under this exception.

² To be clear: the discussion in a closed session must stay within the bounds of the exceptions that the members claimed *before* they excluded the public. For suggestions on how to proceed when it becomes apparent, during the closed session, that the discussion will involve topics or exceptions other than those claimed, *see* 9 *OMCB Opinions* 46, 51 (2013). The short answer is that the members may not simply forge ahead with topics that they did not disclose on the written statement prepared by the presiding officer at the time of the vote to close.

First, a public body's discussions about its staffing needs and methods of meeting those needs seldom fall within the personnel exception. *See, e.g., 3 OMCB Opinions* 67, 68 (2000) (school board's discussion about methods of hiring principals and whether to authorize the superintendent to hire more teachers did not fall within the exception); *6 OMCB Opinions* 104, 108 (2009) (city council's discussion about its options for providing a particular service fell outside the exception). We find that the members' discussion of MHBE's staffing needs fell outside of this exception. We will address later the applicability of the procurement exception later.

Next, whether "PMO resources" provided to MHBE by "PMO vendors" are "employees" over whom MHBE "has jurisdiction" raises a question that the MHBE Board should consider when invoking the personnel exception. In *7 OMCB Opinions* 112, 116 (2011), for example, we concluded that the exception did not apply to the county commissioners' discussion about the sheriff's appointees to the sheriff's committee, because the appointees were not county employees.³ By contrast, when the discussion involves the performance of an independent contractor who provides his or her services to the public body directly, as when the public body contracts with a law firm for the services of a particular attorney, we have concluded that the exception applies to a discussion about the individual's performance. *3 OMCB Opinions* 340, 343 (2003). Here, the status of the "resources" is not clear from the response, so we looked to MHBE's website for elucidation. A request for proposals posted there explains that the PMO "consists of consultants as well as MHBE employees." Clearly, a discussion about personnel matters specific to an individual MHBE employee would fall within the exception. And, a discussion about the performance of a specific individual provided by a vendor would likely fall within the exception to the extent that MHBE has retained control over whether that individual provides services to MHBE. However, a discussion that involves a vendor's performance of its contract to supply people to provide services would likely exceed the exception.

We do not know enough about the closed-session discussion on March 13 to apply these principles. We encourage the MHBE Board to apply them in the future and to include enough information in its closing statements to reassure the public that the exception applies. For example, a

³ In 2005, in a matter involving the discussion by a board of county commissioners about the attributes of individual employees of the local library funded by the county, the Compliance Board was concerned that the commissioners' discussion might have implicated the personnel records of public employees, information that is protected under the Public Information Act. *4 OMCB Opinions* 188 (2005). The Compliance Board then deemed the discussion to fall within the exception despite the fact that the employees fell within the library's "jurisdiction." Those circumstances are not present as to the "PMO resources" employed by vendors. As required by § 10-508(c), we construe the exception strictly and therefore give effect to the condition that the discussion involve "appointees, employees, or officials over whom [the public body] has jurisdiction."

reference to the evaluation of “PMO resources” does not necessarily convey the notion that the members are discussing people.⁴ We turn to the “procurement” exception.

The “procurement” exception is more qualified than most of the others. It provides that, “before a contract is awarded or bids are opened,” a public body may close a meeting to “discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” § 10-508(a)(14). For example, a public body may close a meeting to hear competing offerors’ presentations of their proposals, because that information, if made public, would give an advantage to the offerors who have not yet presented their proposals and would thereby compromise the process. *See 7 OMCB Opinions* 1, 3 (2010). In our broadest reading of the exception, we have speculated that it *might* apply to discussions about the award of “gap” contracts for services that are simultaneously the subject of an ongoing competitive procurement process – *if* the public body can establish that the disclosure of the discussion about the gap contracts would affect the public body’s leverage in the competitive procurement. *See 8 OMCB Opinions* 8, 15 (2012). There, we stated:

If discussion of the gap contracts implicated an impending procurement process, and if open discussion would have adversely impacted that process, then, under those circumstances, the exception may have applied. We stress that for the exception to apply, the public body must be able to identify a tangible connection to a particular procurement in which the public body expects to engage or participate with another public body.

In short, the exception extends either to a discussion about an ongoing procurement or, at the very most, to discussions about the interim provision of the services that will be procured through a competitive process—but in both cases, *only* if the disclosure of the discussion would “adversely affect” the public body’s “ability to participate in the competitive bidding or proposal process.” Seldom, then, are sole-source contracts, task orders, and change orders proper subjects for meetings closed under this exception.

Under these principles, the MHBE Board’s evaluation of proposals for a business process consultant would have fallen within the exception *if*: (1) those proposals came from competing offerors and did not merely pertain to which person on an existing contractor’s roster should serve in that role, and (2) disclosure of the discussion would have adversely impacted an ongoing or planned procurement of those services. In our view, a discussion that might have an impact on a future competitive procurement, if the MHBE were to decide to engage in one, stretches the exception too

⁴ MHBE’s use of the term varies. For example, the response refers to “PMO resources over which the MHBE exercised control,” a usage that connotes entities, rather than people.

far. Any discussion about MHBE's staffing needs that was not inextricably connected to an ongoing or imminent procurement process would have exceeded the scope of the exception.

As to the applicability of the procurement exception, the conclusion we stated at 8 *OMCB Opinions* 15 about that public body and its committees applies here. We stated:

In sum: to the extent that the [public bodies] have discussed contract amendments, sole-source contracts, and memoranda of understanding in closed sessions under circumstances which neither establish an adverse impact on a competitive bidding or proposal process nor satisfy another exception, they violated the Act. When such a discussion would have an adverse impact on an ongoing competitive procurement, we encourage the [public body] to provide the public with sufficient information in its closing statements and closed-session summaries to demonstrate the applicability of the exception to what otherwise might appear to be a separate matter.

As to both exceptions, the MHBE Board's failure to articulate for each topic its reason for excluding the public from the discussion of that topic made it difficult for us to apply the principles set forth above. If MHBE discussed staffing needs and other matters in a context other than that of a particular competitive procurement or a particular individual's attributes, it violated the Act.

C. The November 26, 2013 meeting

The MHBE Board's summary discloses that "[t]he Board adjourned to closed session for procurement related to VPN funding training specialist support, and potential change orders for Noridian. The Board approved funding for VPN services." The minutes of the teleconference meeting that preceded the closed session disclose only that the Board decided to close it. The sealed minutes show that the Board voted to close the session on the basis of the procurement exception and § 10-508(a)(7), the exception that permits a public body to "consult with counsel to receive legal advice." The response states that the meeting was closed under the procurement exception and § 10-508(a)(8), the exception that permits a public body to meet behind closed doors to "consult with staff, consultants, or other individuals about pending or potential litigation." The closed session minutes show that at least part of the discussion fell properly within both the legal advice and the potential litigation exceptions. The applicability of those exceptions to the approval of "VPN funding" is unclear, and we reach no determination on that topic. We encourage public bodies not to use acronyms that the public might not understand, and, when an action bears no apparent relation to the claimed exception, to explain the connection. And, as explained above, a public body is bound by the statutory exceptions it cites when the members vote to close the meetings.

As we explained in May, and as the MHBE board has acknowledged, its disclosure practices during this period fell short of the Act's requirements. Had the MHBE made the required disclosures, this closed meeting would likely have complied with the Act.

D. The December 17, 2013 meeting

The MHBE Board's summary discloses that "[t]he Board adjourned to closed session to discuss personnel related matters and to receive advice for potential litigation." The minutes of the open meeting that preceded the session disclose that the MHBE Board "voted unanimously to move into close[d] session." Those minutes cited the exceptions for the discussion of personnel matters and the receipt of legal advice. We have reviewed the sealed minutes. Had the MHBE made the required disclosures, this closed meeting, too, would have complied with the Act.

E. December 30, 2013 meeting

The MHBE Board's summary discloses that "[t]he Board adjourned to closed session to receive legal advice related to potential litigation." The open-session minutes state: "The Board went into close[d] session to discuss matters related to procurement." Those minutes cite § 10-508(a)(14), the procurement exception. The sealed minutes cite § 10-508(a)(8), the potential litigation exception. They describe a discussion that would have fallen within that exception, but, as far as we can tell, not within the procurement exception. We conclude that although the public was not entitled to hear the discussion, MHBE violated the Act by discussing matters that did not fall within the exception claimed.

II. The Third Complaint

In his third complaint, Complainant alleges that the MHBE violated the provision of the Act that requires a public body to respond to a complaint. Specifically, Complainant alleges, the MHBE Board's response to his first complaint failed to mention that the MHBE appointed an interim director at the December 6, 2013 closed session that was the subject of that complaint. Instead, Complainant alleges, the response left the impression that the sole subject of discussion was the resignation of the current director.

While we agree with Complainant that responses must be accurate and complete, we do not perceive a violation of the Act here. The response stated that the MHBE met without notice on December 6 because it "could not delay its consideration of Ms. Pearce's offer of resignation or the other key personnel decisions that would need to be made in connection with a leadership transition." Further, the Compliance Board has generally found that a public body's appointment, as opposed to its approval or recommendation of an appointment, is an administrative function and thus not subject to the Act. *See 9 OMCB Opinions* at 112-13. The December 6

meeting was not subject to the Act, and the timing of the MHBE's press releases on the hiring of its director is not a matter for us.

III. Conclusion

Our inability to resolve the allegations as to all but the December 30 closed meetings in 2013 arises in large part from the MHBE Board's failure to prepare the required disclosures at the time of those meetings. While we are unable to declare conclusively that the MHBE Board discussed matters beyond the personnel and procurement exceptions that it claimed for the first three meetings, we note that neither the response to the complaint nor the meetings documents establish the applicability of the exceptions to the topics discussed. We encourage MHBE Board to apply the principles that we discussed in our consideration of those meetings. As to the December 30 meeting, we find that the MHBE violated the Act by discussing matters that did not fall within the exception claimed. Nonetheless, it appears that the MHBE Board could have closed that meeting legally had it cited the applicable exception.

In closing, we note that unless another law requires a public body to discuss a particular topic behind doors, the decision to exclude the public is discretionary. We encourage the MHBE Board to consider, for future meetings, two questions: first, will each topic to be discussed in closed session fall within the scope of the exception claimed for it; and, second, even so, is there a need to exclude the public?

Open Meetings Compliance Board

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